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QUESTIONS PRESENTED FOR REVIEW

1. Whether a conspiracy to blockade medical clinics providing abortions and related services to women, substantial numbers of whom travel from other states, is a basis for a cause of action under 42 U.S.C. § 1985(3).

2. Whether, in any event, the district court properly exercised its discretion to assume pendent jurisdiction over respondents' related state law claims.

3. Whether respondents are entitled to attorneys' fees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-985

JAYNE BRAY, OPERATION RESCUE, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC,
NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case involves a mass conspiracy to deny women the freedom to exercise their constitutional rights to privacy, and to engage in interstate travel and commerce, by means of physical blockades of medical facilities providing abortions and related advice and services to women. As the district court found, petitioners' blockades threaten women throughout the country by directly attacking women who seek to exercise their rights. By means of these blockades

petitioners hope "to dissuade women from seeking a clinic's abortion services [and] to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely." 726 F. Supp. 1483, 1488 (Pet. App. 20a).[1]

While petitioners imply that their conduct is akin to the peaceful lunch-counter sit-ins of the 1960's, nothing could be further from the truth. Petitioners attempt, not to assert their own legal rights as the sit-in demonstrators did, but to deny the rights of others. Thus, they do not assert the protections of law but instead thwart law by physically blockading targeted medical facilities, and disobeying requests of police to leave. Their conduct in the streets is mirrored by a similar contempt for the rule of law laid down by the courts. Trial testimony demonstrated that leaders of the blockades urged those attending a rally in Washington, D.C. to disregard federal court injunctions in the District of Columbia, Maryland and

[1] The court noted that blockades have occurred in five states in addition to the Washington Metropolitan Area. 726 F. Supp. at 1490 (Pet. App. 23-24a). *See also* trial transcript ("Tr.") 11, Nov. 16 pm (Ireland). Plaintiffs' trial exhibit ("Ex.") 5 (Tr. 84, Nov. 16 am (Dickinson-Collins); *id.* at 11-12) (on April 29, 1989, blockades in 46 cities, and medical facilities voluntarily closed in 17 other cities for fear of blockades); Ex. 16 (Tr. 23, Nov. 20 am).

Petitioner Operation Rescue provides "materials (videos, cassettes, literature, etc.) to help . . . organize and stage" such blockades, Ex. 1 (Tr. 82, 85, Nov. 16 am (Dickinson-Collins)), and holds national conferences to train people in blockade techniques. Tr. 7, Nov. 16 pm (Ireland).

"Pet. App." designates the Appendix to the Petition for Writ of Certiorari.

Virginia and to participate in blockades.[2] And in Maryland and the District of Columbia, several of the petitioners have been held in contempt of court for violating nearly identical federal court injunctions forbidding blockades.[3]

Federal law, through 42 U.S.C. § 1985(3), plainly affords a remedy for the deprivation of federal rights by the mob action that this record reveals. Here, there was (1) a conspiracy, (2) to deprive a protected category or group, (3) of equal access to rights protected by federal law against hostile private conspiratorial action. Where these three components are present, federal courts are authorized by Section 1985(3) to assist state and local authorities to ensure that members of historically vulnerable groups shall not be deprived of their equal enjoyment of the rule of law.

Proceedings Below

Respondents, plaintiffs below, are medical facilities in the Washington Metropolitan Area, and women's organizations representing their women members who may seek the services of such facilities.[4] They filed their complaint in the United States District Court for the Eastern District of Virginia on November 8, 1989, shortly before dates announced by Operation

[2] Tr. 71, Nov. 16 pm (Johnson).

[3] National Organization for Women v. Operation Rescue, No. N-89-3098 (D. Md. Nov. 15, 1990); National Organization for Women v. Operation Rescue, No. 89-2968-LFO (D.D.C. Jul. 30, 1990).

[4] Counsel state, pursuant to Rule 29.1, that none of the respondents that is a corporation has any parent or subsidiary corporation.

Rescue for blockades of Washington Metropolitan Area women's health clinics.

Respondents had originally filed a single complaint in the United States District Court for the District of Columbia. That court, hearing respondents' motion for a preliminary injunction, stated that it would grant an injunction but only one limited to the District. For that reason, separate actions had to be filed in Maryland and Virginia to enjoin the blockades threatened throughout the Washington Metropolitan Area.[5]

The Virginia complaint, in common with the complaints in the other two jurisdictions, alleged that petitioners, and others in concert with them, planned forcibly to preclude women and "women who seek the services of providers of abortions and related services" from exercising their constitutional rights to privacy and to the privileges and immunities guaranteed to all citizens, including the right to travel, in violation of Section 1985(3). J.A. 15-16. An accompanying motion for a temporary restraining order was granted after two days of hearings.

The hearing on respondents' motion for preliminary injunction began on November 16, 1989. At the outset, Judge T. S. Ellis III ordered that the trial on the merits be advanced and consolidated with the hearing on the preliminary injunction motion. Respondents presented numerous exhibits and the testimony of nine witnesses. Petitioners presented no evidence and have never filed an answer. The court granted the requested injunction from the bench and subsequently published its findings and conclusions.

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[5] The D.C. and Maryland actions are cited in note 3, *supra*.

J.A. 28 (oral opinion); 726 F. Supp. 1483 (Pet. App. 14a). The court acted both pursuant to Section 1985(3), finding that respondents' "members and patients constitute a subset of a gender-based class" that has "discrete, insular and immutable characteristics" entitling it to protection under that statute,[6] and upon pendent state law claims of trespass and nuisance. 726 F. Supp. at 1492, 1494-95 (Pet. App. 28-29a, 33-36a). The court concluded "that unless the threatened and unlawful acts to [respondent] clinics are immediately and permanently enjoined substantial and irreparable harm will be suffered by the [respondents] and their members and patients who seek the services of the clinics." *Id.* at 1490 (Pet. App. 25a). The court's injunction is scheduled to expire on September 24, 1991.

On appeal, the Fourth Circuit affirmed the district court in all respects by *per curiam* opinion. 914 F.2d 582 (Pet. App. 1a) (Wilkinson and Chapman, Circuit Judges; Anderson, District Judge). The court found

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[6] Numerous other courts have reached the same conclusion. *See, e.g.*, New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); National Organization for Women v. Operation Rescue, Bo. 89-2968-LFO (D.D.C. Jul. 30, 1990); Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989); Aradia Women's Health Center v. Operation Rescue, No. 88-1539R (W.D. Wash. Jul. 7, 1989); Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa 1989), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990); *see also* National Organization for Women v. Operation Rescue, No. N-89-3098 (D. Md. Nov. 15, 1990). *But see* National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal docketed*, No. 90-5519 (9th Cir. 1990).

that petitioners' activities "crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law." *Id.* at 585 (Pet. App. 8a). The court agreed with the district court that a "gender-based animus satisfies the 'purpose' element of § 1985(3)" (*id.*), and affirmed the district court's discretion to assert pendent jurisdiction and grant relief on the state law claims. *Id.* at 586 (Pet. App. 9a).

Statement of Facts

The enjoined blockades are an effort at mob intimidation. What the courts below have enjoined is not speech, distributing leaflets, peaceful demonstration, or symbolic expressive conduct designed to persuade women not to exercise their constitutional rights.[7] The district court observed that "[t]his is not a case of a clash of rights." J.A. 39. "I am reasonably confident . . . that we wouldn't be here today if it were simply a matter of defendants holding up placards or issuing invitations to people walking by on the sidewalk."[8]

Blockades of the kind that the district court enjoined have been perpetrated by petitioners and their co-conspirators in the Washington Metropolitan Area and elsewhere in the country. The court's injunction

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[7] While petitioners would characterize all they do as "rescues" and use "rescue" as a broad term encompassing speech activity (Pet. Br. 4-5), the fact is that the lower courts enjoined only petitioners' physical blockades.

[8] Tr. 28, Nov. 16 pm. Petitioners in fact shun political discourse. *See, e.g.*, Ex. 1, *supra* note 1 ("our political and educational efforts are too late"); Ex. 17 (Tr. 24, Nov. 20 am). Indeed, testimony at trial indicated that those who oppose abortion, but seek to outlaw it only through lawful means, are referred to as "wimps for life." Tr. 6, Nov. 16 pm (Ireland).

of future blockades was thus based not only on predictions of what would happen, but also on substantial evidence of petitioners' egregious conduct when they stage these blockades.

When petitioners stage a blockade, hundreds of people mob the doors of the selected clinic and prevent everybody—the women who are the clinic's patients and prospective patients, and the doctors, nurses, and others there to serve them—from entering. 726 F. Supp. at 1488 (Pet. App. 20a).[9] The women, indeed, may not even reach the barred doors. Clinic parking lots are rendered inaccessible; petitioners use such devices as parking a car in the middle of the entrance to a parking lot and letting the air out of its tires. *Id.* at 1489-90 (Pet. App. 23a).[10] Petitioners have also strewn nails on a clinic's parking lot and neighboring streets. *Id.*

Clinics in the Washington Metropolitan Area that have been blockaded or threatened with blockades provide many services for women, not limited to the performance of abortions.[11] Although petitioners profess a purpose solely of preventing abortions, women coming to a clinic even for emergency prenatal care are barred along with all the other patients.[12]

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[9] *See also* J.A. 22 (Ex. 1); Tr. 36, 59, Nov. 16 am (Dickinson-Collins) ("it's not just the abortion patients who cannot get in"); Tr. 51-52, Nov. 16 pm (Lt. King).

[10] Tr. 36-37, Nov. 16 am (Dickinson-Collins).

[11] *See, e.g.*, Tr. 5, 10, Nov. 16 pm (Dr. Williams). One clinic operator noted that the staff goes "very thoroughly through . . . all alternatives to a problem pregnancy" and provides "emotional counseling to see if [women considering abortion] are firm in their decision." Tr. 61, Nov. 16 am (Dickinson-Collins).

[12] Tr. 37, Nov. 16 am (Dickinson-Collins).

The district court found that, as a result of petitioners' blockades, women seeking abortions and counseling "are likely to suffer irreparable physical and emotional damage." *Id.* at 1496 (Pet. App. 22a). Abortion sometimes entails the insertion of a dilating device which, if not removed promptly when it is supposed to be removed, puts the woman at risk of "infection, bleeding and other potentially serious complications." *Id.* at 1489 (Pet. App. 21a). Prenatal patients, those suffering from complications resulting from abortion surgery, and those seeking crisis counseling also need immediate treatment.[13] If petitioners have mounted a blockade at a clinic, "patients requiring the . . . removal procedure or other vital medical services must either postpone the required treatment and assume the attendant risks or seek the services elsewhere." *Id.* And, as the district court added, "[u]ncontradicted trial testimony established that there [are] numerous economic and psychological barriers to obtaining these services elsewhere." *Id.* One witness testified that "women literally fall in the door crying . . . . Many times blood pressures have elevated."[14]

As the district court noted in the particular context of medical emergencies, many women cannot simply go to another clinic when they find that their own is blockaded. *Id.* Some of the procedures, particularly for later-term abortions, are performed at only a few clinics.[15] In addition, many of the women patients are

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[13] *Id.* at 59.

[14] *Id.* at 56; *see also id.* at 56-69.

[15] Tr. 31, Nov. 20 am (Lofton) (nearest clinics providing some abortion procedures are in New York and Georgia).

poor and cannot afford to go to a hospital for emergency care, "mak[ing] it difficult, if not impossible, for indigent patients to obtain necessary services from other facilities . . . ." *Id.* at 1489 n.3 (Pet. App. 21a n.3). Other women patients suffer economic harm from the inability to get treatment on the day of a blockade; many have made arrangements for child care and transportation that cannot be changed.[16]

In addition, the burdens on many of the women patients of these clinics are greater because they have traveled from out-of-state to patronize a clinic that provides the services they need. Twenty to thirty percent of the patients of one Northern Virginia clinic came from out-of-state. *Id.* at 1489 (Pet. App. 22a). Patients came to that clinic from, in addition to the District of Columbia and Maryland, Pennsylvania, West Virginia, New Jersey, New York, and Florida. *Id.*[17] Many women come from distant states to Northern Virginia clinics, and Washington Metropolitan Area clinics generally, because the service they need is not available near their home, either because no facility performs it, or because those that do are overburdened.[18] For example, one clinic in the Washington Metropolitan Area performs second trimester abortions up to the 26th week for documented cases of rape and incest; no other clinic in the area and very few elsewhere provide this service.[19]

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[16] Tr. 58, Nov. 16 am (Dickinson-Collins); Tr. 14-15, Nov. 16 pm (Dr. Williams).

[17] *See also* Tr. 68, 73, Nov. 16 am (Dickinson-Collins).

[18] Tr. 22, Nov. 20 am (Lofton) (*e.g.*, Manhattan and Baltimore facilities have waiting lists).

[19] *Id.* at 19-20, 31.

The clinic staff is also subject to physical intimidation. At a facility that was blockaded during the trial of this case, conspirators "started to bang on the trunk of [a physician's car and attempt] to turn the car over because someone identified him as a physician, and they also tore the emblem off of the front of his car."[20]

The blockades that took place at Washington Metropolitan Area clinics at the time this case was being tried provide an example of what all blockades mean for women and those who are trying to serve them. Five women scheduled to have dilation devices removed at one blockaded clinic were physically prevented from entering to undergo a timely removal. *Id.* at 1490 (Pet. App. 23a). They were trapped in a car surrounded by a mob of blockaders in the parking lot, and two of them began bleeding.[21] Two other patients had entered the clinic early and were trapped inside. One began to bleed, and because no doctors or nurses could get through the blockade, only a nurse's aide, who luckily had also entered the building early, was able to assist her.[22]

Local law enforcement authorities do not have the resources to prevent petitioners' blockades from having their intended effect of closing the clinics. *Id.* at 1489 n.4, 1496 (Pet. App. 22-23a n.4, 37a).[23] Petitioners do not let anybody but the leaders know in advance which clinic or clinics are going to be blockaded. *Id.*[24] Thus, they are able to mob a clinic without hindrance from local police. Once a blockade is in place, it often takes hours for the police to open a facility, as the blockaders must be carried away one by one. *Id.* at 1489-90 (Pet. App. 22-23a).[25] Petitioners are undeterred by the prospect of arrest.[26] Indeed, they repeat their blockades at the same clinics *despite* massive arrests.[27] The district court cited the example of Falls Church, a small community with a police force of only thirty deputies. *Id.* at 1489 n.4 (Pet. App. 22a n.4). When petitioners blockaded a clinic there, it was closed for six hours. *Id.* At a Maryland clinic, authorities asked the facility to close for the day when they were informed that a mob of blockaders was heading toward it.[28] Because the facility had to perform emergency procedures that could not be handled anywhere else in the area, it was not willing to close.

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[20] *Id.* at 25. The clinics themselves are also subject to serious physical depredations. At one clinic in Virginia, conspirators defaced signs and damaged fences on the facility property. That is the same clinic where they strewed nails over the parking lot and in neighboring public streets and blocked the parking lot with an immobile car. 726 F. Supp. at 1489-90 (Pet. App. 23a). Blocking of streets has resulted in auto accidents. Tr. 37, Nov. 16 am (Dickinson-Collins).

[21] Tr. 28, Nov. 20 am (Lofton).

[22] *Id.* at 38.

[23] *See also* Tr. 24, Nov. 16 pm (Ireland).

[24] *See also id.* at 53 (Lt. King); *id.* at 27 (Ireland).

[25] *See also id.* at 52-55 (Lt. King); *id.* at 24-25 (Ireland).

[26] Ex. 1, *supra* note 1 ("Rescuers are usually arrested, charged with a minor infraction, such as trespassing or disorderly conduct, and released the same day."); Ex. 17, *supra* note 8 ("In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved."); Tr. 73, Nov. 16 pm (Johnson) (Operation Rescue leaders held up as heroes for spending time in jail for blockading activity).

[27] Tr. 72, Nov. 16 am (Dickinson-Collins); *see* Tr. 48-57, Nov. 16 pm (Lt. King).

[28] Tr. 19-20, Nov. 20 am (Lofton).

The outnumbered police could do nothing, however, to prevent the closure, and the clinic was forcibly closed to its emergency patients and all others.[29] Even after it was opened, clinic staff had to escort distraught and bleeding women into the building, pushing their way through remaining blockaders who sought to block their access.[30]

SUMMARY OF ARGUMENT

The injunction issued below must be sustained on either federal or state law grounds, or both.

I.

A. The federal claim, based on Section 1985(3), requires proof of a conspiracy to deprive a class of persons of a federal right for invidiously discriminatory reasons. There is no issue here as to the existence of the requisite conspiracy. While this Court has not formally held that women are a class of persons entitled to the protections of Section 1985(3), that result is forecast by (1) prior opinions of this Court dealing with Section 1985(3) and related statutes, (2) the language of Section 1985(3), (3) the legislative history of the statute, (4) its basic purpose to provide protections to persons who may be victimized by pri-

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[29] *Id.* at 30, 33, 35, 38-39 (police could not provide safe passage into the facility for emergency cases or safe passage out for patients trapped inside). *See* 726 F. Supp. at 1489 n.4 (Pet. App. 23a n.4) (blockaders typically outnumber police). Even on the rare occasion when police receive "intelligence" about where a blockade will occur, petitioners' mob action overwhelms local resources. Tr. 53, Nov. 16 pm (Lt. King).

[30] Tr. 42, Nov. 20 am (Lofton).

vate actions directed at their rights, and (5) the unanimous conclusion of all those courts of appeal that have addressed the question of whether women are within the protection of Section 1985(3).

B. In this case, the enjoined activities have clearly been targeted at women. It is women, and only women, who can exercise the federally-guaranteed rights at issue in this case. That not all women will be in a position to, or choose to, exercise these rights is legally irrelevant, just as it would have been irrelevant in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), for defendants in that case to have offered to prove that not all Blacks were interested in exercising their civil rights.

C. As in *Griffin*, the requisite "invidiously discriminatory animus" is readily discernible from the facts of the case. To establish this element of the wrong, respondents are not required to prove that petitioners are misogynists, any more than plaintiffs in *Griffin* would be required to prove that defendants in that case hated all Blacks. "Animus" does not mean hostility, as both petitioners and the United States seem to understand. The word means "motive" or "purpose." The purpose here is to nullify or destroy certain federal rights of women. Petitioners' purpose to prevent the exercise of these rights is invidiously discriminatory for the same reason that the purpose in *Griffin* to punish or discourage the exercise by Blacks of their civil rights was invidiously discriminatory.

II.

Petitioners' blockades directly impact women's attempts to travel interstate to obtain abortions and related services, as well as their cognate right to

participate in interstate commerce in such services. These rights are incident to national citizenship and protected against hostile private action. The record here shows a far more substantial flow of travel and commerce than has been shown in many of the Court's cases, including *Griffin*, and, similarly, a far more sustained and substantial impact on that travel and commerce than has been present in the cases, such as *Griffin*, where a single episode of obstruction was sufficient.

III.

As to the pendent state law claim, there is no sensible basis upon which to argue that the district court's exercise of discretion to assert jurisdiction over this claim, affirmed by the court of appeals, was improper. The federal claim is clearly non-frivolous. It has been endorsed in this case by both lower courts. It has also been endorsed in virtually identical proceedings by the Second Circuit Court of Appeals, and by a number of federal district courts. There is no challenge to the holdings below that Virginia's laws had been, and were threatened to be, violated. There is no basis upon which the injunction may be set aside.

ARGUMENT

This case arises out of threats by an organized mob to use force to deny women the equal enjoyment of critical legal rights secured to them by the United States Constitution. The federal issue posed here is whether federal courts possess power pursuant to Section 1985(3) to protect women from such mob action. The district court and the court of appeals were

correct in finding that petitioners had alleged and proved all the elements of a Section 1985(3) claim.

The class is a class of women.[31] This is a valid Section 1985(3) class. The motive, or animus, of petitioners' conspiracy was directed against the class of women and the conspiracy would, if carried out, infringe upon the exercise of constitutional rights of women that are protected against private infringement.

I. RESPONDENTS HAVE ESTABLISHED A VALID CLASS OF WOMEN FOR SECTION 1985(3) PURPOSES AND INVIDIOUSLY DISCRIMINATORY ANIMUS DIRECTED AGAINST THAT CLASS

This Court has inferred from the terms of Section 1985(3) a requirement of "class-based, invidiously discriminatory animus behind" the actions of the conspirators against whose conduct Section 1985(3) provides a remedy. *Griffin* v. *Breckenridge*, 403 U.S. at 102. Plainly women are an identifiable, discrete group, or class, of persons. All that remains to be shown is that women constitute a class entitled to the federal protection against private conspiracies provided by Section 1985(3), and that the conspirators' animus was indeed "class-based" because the conspiracy was aimed at depriving that class of its rights.

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[31] Petitioners and the Government argue against a class defined as "women seeking abortion," but in so doing they misstate the issue. The question is whether petitioners have conspired to deprive women of certain constitutional rights by targeting those women who attempt to exercise those rights. See *infra* § I.B.; J.A. 15-16 (Complaint ¶¶ 39, 41).

A. Women Are a Class Within the Meaning of Section 1985(3)

The plain, expansive language of Section 1985(3), its context and legislative history, and its historic place as a measure to combat mob conduct that threatens the just and equal enforcement of the laws for members of vulnerable groups, all demand that this statute be applied to women. Indeed, neither the petitioners nor the Government argue that women are not a class for Section 1985(3) purposes.

The language of Section 1985(3) is broad and unconfining.[32] It encompasses conspiracies whose purpose is to deprive "any person or class of persons" of equal rights. On its face, the statute is not limited to protecting Blacks, or Blacks and the champions of their cause, though it was clearly the lawless treatment of the former slaves and their Republican allies in the Reconstruction Era South that inspired the legislation. Congress could have limited the reach of the statute to the evil that immediately inspired it, but it did not. The Court, in construing the criminal analogue of Section 1985(3),[33] has said that it "must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U.S. 787, 801 (1966). The Court quoted that admonition when it rid Section 1985(3)

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[32] "If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . ." any person injured thereby shall have a cause of action. 42 U.S.C. § 1985(3).

[33] 18 U.S.C. § 241.

of a "state action" limitation that an earlier Court had read in without textual justification. *Griffin* v. *Breckenridge*, 403 U.S. at 97. The admonition is just as apposite to the issue posed here.

Furthermore, the near neighbor of Section 1985(3) in Title 42 is the familiar Section 1983. Both were enacted in 1871 as parts of the Civil Rights Act of 1871, known as the Ku Klux Klan Act. Ch. 22, 17 Stat. 13. They contain similar language.[34] As this Court knows, Section 1983 has been construed to protect a broad range of persons in addition to Blacks. Section 1983, like Section 1985(3), protects "persons" from deprivations of "rights, privileges, or immunities." Neither statute refers to race; nothing in Section 1983 suggests that its reference to "persons" is any broader than the "persons" referred to in Section 1985(3).

The Court has canvassed the legislative history of Section 1985(3), and of the Ku Klux Klan Act more generally, several times. *See, e.g., Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 370 n.7 (1979); *see also United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825, 834-37 (1983); *id.* at 850-53 (Blackmun, J., dissenting). That history confirms the

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[34] Section 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

breadth of the language and, in particular, supports the proposition that the class of women is within the protection of Section 1985(3).

An appropriate beginning point in the consideration of the history is the sweeping description of his legislation offered by Representative Shellabarger, the sponsor of Section 2 of the bill, from which Section 1985(3) is derived. He said that "the object" of the amended language of the section (which read much as the statute reads today) was "the prevention of deprivations which shall attack the equality of rights of American citizens"—all American citizens. Cong. Globe, 42d Cong., 1st Sess. 478 (1871). He added that "any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." *Id.*

In the same vein, Representative Wilson remarked soon after that, by the bill, Congress would "secure to all persons the equal protection of the laws." *Id.* at 481-82. He later expanded on the inclusiveness theme: "there is not of all the thirty-eight million of the citizens of this nation one so humble that his rights under the Constitution and the laws can be [ignored]." *Id.* at 484; *see also id.* at 485 (Rep. Cook). Others took up the theme. Representative Perce said that Congress sought to protect the rights of "citizens throughout the entire country, without regard to the condition, race, or party affiliation of the individual citizen." *Id.* at 512. Protection, said Representative Lowe, is to be given to "all classes in all states; to persons of every complexion and of whatever politics." *Id.* at 376.

The sponsors spoke not only in general of protection of American citizens, but of specific groups and persons, in addition to Blacks and their champions, whom the bill would protect. *See, e.g., id.* at 486 (Rep. Cook) and 336 (Rep. Kelley) (citizens of other states); *id.* at 517 (Rep. Shellabarger) and 571 (Sen. Ames) (Republicans); *id.* at 567 (Sen. Edmunds) (a Democrat, a Catholic, a Methodist, a Vermonter would be covered);[35] *id.* at 335 (Rep. Hoar) (Indian tribes).[36]

Finally, and directly apropos of this case, Representative Buckley stated that "[t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well,

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[35] The well-known remark of Senator Edmunds of Vermont, concluding with the self-deprecating suggestion that even a conspiracy against a person "because he was a Vermonter" would be covered, was quoted by the Court as "not without weight" in United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. at 836-37.

[36] Many commentators have similarly concluded that Section 2 of the Ku Klux Klan Act reaches a broad range of conspiracies. These articles quote, at considerable length, statements made on the floor of Congress regarding this issue. They state, after reviewing the debate, that congressional intent was never narrowly limited to Blacks. *See, e.g.*, McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 Conn. L. Rev. 471, 486, 491 (1987); Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 Rutgers L. Rev. 515, 559-68 (1987); Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, B.C.L. Rev. 911, 929-33 (1986); Comments, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 Chi. L. Rev. 402, 407-11 (1979).

not the colored only, but the whites also; *yes, even women* . . . ." *Id.* at App. 190 (emphasis added).[37]

The legislation that is now Section 1985(3) was written to ensure that the promise of the equal protection of the laws was not negated by mob action. Section 1985(3) is tied by language and history to the Fourteenth Amendment and particularly the Equal Protection Clause. As originally enacted, the Ku Klux Klan Act of 1871 was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. The Equal Protection Clause, no doubt written principally to ensure equality of treatment of the newly freed slaves, has long since been held to protect other groups. Women are among the classes that have special protection. *E.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-26 (1982); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971). As this Court said in *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976), sex, like race, is an "obvious badge"; the Court emphasized "the pervasiveness of the historic, legal and political discrimination against women."

This Court assumed, without deciding, in *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366. that a conspiracy to discriminate in employment on the basis of sex came within Section 1985(3). The complainant

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[37] The Court of Appeals for the Third Circuit found in remarks of Senator Trumbull on "privileges and immunities" in Section 2 of the Act, Cong. Globe, 42d Cong. 1st Sess. 576, an "underlying premise . . . that women are within the reach of § 2." Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1242 (3d Cir. 1978) (*en banc*), *vacated on other grounds*, 442 U.S. 366 (1979).

there was a man who claimed to have been fired for supporting women who asserted that their employer had discriminated against them. The Court held that injury done by a conspiracy to violate the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, could not also be redressed under Section 1985(3), even though literally included in that statute. The Court did not question that the complainant had alleged a conspiracy with the requisite "class-based, invidiously discriminatory animus." All of its analysis of the relationship of Section 1985(3) and Title VII was unnecessary unless there was a Section 1985(3) "class" of women to begin with.

Justice White, speaking for himself and two others, was surely justified, then, in stating in dissent that "the Court correctly assumes that the answer to this question [whether "discrimination on a basis other than race may be vindicated under § 1985(3)"] is 'Yes.' " *Id.* at 389 n.6. The dissent went on to say that "[i]t is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3)." *Id.*

The Court has professed to leave open the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Griffin* v. *Breckenridge*, 403 U.S. at 102; *see also United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. at 836, describing as "a close question" whether Section 1985(3) reaches classes other than Blacks and their champions. The Court in *Scott* was concerned that too expansive a reading of Section 1985(3), extending its coverage to groups whose only common ties were economic, would give it a reach

inconsistent with federalism. *See id.* at 836-39. The concern was not that Section 1985(3) might reach classes akin to "Negroes and those who championed their cause." Four Justices dissenting in *Scott* said that Congress intended to provide a remedy for any class of persons "whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities." *Id.* at 853 (Blackmun, J., dissenting). The dissenters went on to say "certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement." *Id.*[38]

There is thus every reason in text, context, history, and precedent for the Court to act here to make the *Novotny* assumption law. The class of women easily satisfies the requirement of the Court, as stated in *United Brotherhood of Carpenters & Joiners* v. *Scott*, that "the class must exist independently of the defendants' actions". 463 U.S. at 850.[39] Petitioners'

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[38] In both *Scott* and *Novotny* the Court expressed concern regarding the existence of more recently-enacted statutory schemes, specifically tailored to deal with the type of conduct challenged. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. at 372-78 (employment discrimination addressed under Title VII); United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. at 838-39 (union/employee relations addressed in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*). Use of Section 1985(3) in these cases thus might have disrupted an existing remedial scheme. By contrast, petitioners' conspiratorial campaigns of intimidation are not regulated by a more specifically tailored federal remedy, and they are precisely the sort of private deprivation of rights at which Congress was aiming in adopting Section 1985(3).

[39] Petitioners' attempt to pose such non-issues as whether persons "seeking alcoholic beverages," "animal rights proponents," etc. are valid classes should be unavailing. Pet. Br. 18.

speculation that construing Section 1985(3) to include gender-based discrimination "would be to open a statutory Pandora's Box" is unpersuasive. Pet. Br. 19 n.10. To recognize women as a class would create no intractable problems; the recognition of the right of Blacks and their champions to claim against private conspiracies under Section 1985(3), extended two decades ago, has not bred extensive litigation or otherwise caused difficulties. Every court of appeals that has considered the matter and attempted to forecast this Court's ruling has concluded that gender-based classes are within the protections of Section 1985(3).[40] This Court should affirm that judgment.

Respondents' class is not defined by an activity, as petitioners argue, Pet. Br. 17-18, but by immutable characteristics.

For this reason, petitioners' reliance on some language from Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975) is misplaced. Pet. Br. 18. The discrimination alleged there was between the plaintiff class, forced by the conspiracy to work for less than the federal minimum wage, and all other American workers. There was nothing to distinguish the plaintiff workers from all other American workers. That "the motivating animus must be created by a fact other than possession of the right deprived" (quoted at Pet. Br. 18), is simply an expression of the recognized maxim that the class must be defined in terms other than simply the identity of those injured by the conspiracy. *See also* Roe v. Abortion Abolition Society, 811 F.2d 931, 935 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987) (rejecting a Section 1985(3) claim where, according to plaintiffs, "the class in this case consists of those people who do not agree with [petitioners'] point of view.").

[40] New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989) *cert. denied*, 110 S. Ct. 2206 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988); Stathos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235; Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978); *see* Browder v. Tipton, 630 F.2d 1149, 1154 (6th Cir. 1980).

B. Petitioners Conspired Against a Gender-Based Class

Petitioners' conspiracy is aimed at a gender-based class, a class of women. As Judge Ellis said, petitioners hope through their actions "to dissuade *women* from seeking a clinic's abortion services." 726 F. Supp. at 1488 (Pet. App. 20a) (emphasis added). A conspiracy to prevent women from obtaining the services of providers of abortions and related services, and from traveling interstate for such services, is a conspiracy against women.

Petitioners do not address whether their conspiracy is a conspiracy against women. Instead, their arguments focus on the irrelevant question whether Section 1985(3) protects a class defined by an activity, "seeking abortion," and not by its own characteristics.[41] The question is whether people conspire against women as a class when they target specifically those women who elect to exercise their constitutional rights respecting abortion and related services (including the right to travel interstate for such services) with a purpose to suppress exercise of those rights by women generally.

The answer to that question is "yes" because the capacity to bear children and the ability to undergo abortion, and the capacity to make decisions in respect thereto, link all the women who are the objects of the conspiracy and are a defining characteristic of being a woman. The Court recently recognized this principle in *International Union* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991), which dealt with Title VII of the Civil Rights Act of 1964. The respondent employer in effect barred women of childbearing capacity from certain jobs. This was, as the Court said, "a facial classification based on gender." *Id.* at 1202. The Court did not accept the argument that the employer's policy was gender-neutral, with merely a discriminatory effect on women (which would have entitled the employer to make defenses not available against a classification that discriminates on its face). *Id.* at 1202-03. Congress, to be sure, had specifically declared in the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, that, for purposes of Title VII, discrimination "because of or on the basis of pregnancy" is discrimination "on the basis of sex." The Court's conclusion that the employer's policy, on its face, effected a discrimination based on sex was not, however, dependent on that declaration. The Court referred to the Act only to say that its conclusion was "bolstered" by it. *Id.* at 1203. The Court's conclusion was that a private employer's discrimination against women with the capacity to bear children discriminated against women.[42]

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[41] Thus, petitioners' long argument that opposition to abortion is not the *per se* equivalent of discrimination against women is off the point. Pet. Br. 19-24. There is no claim that it is. Similarly, the United States argues that opposition to abortion is not opposition to women because abortion is "inherently different," citing Harris v. McRae, 448 U.S. 297, 325 (1980). United States Br. 6, 19. There is no attempt to show, however, what significance this "difference" has to the issues presented here.

[42] This Court saw in Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981), that legislation which classifies on the basis of a trait that, as a matter of biology, only one sex possesses makes a gender-based classification. California's statutory rape law prohibited "sexual intercourse accomplished with a female not the wife of the the perpetrator, where the female is under the age of 18 years." 450 U.S. at 466. The plurality

While *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is much emphasized by the Solicitor-General, United States Br. 6, 16-19 (but not relied on by petitioners), it does not deal with the issue presented here—whether there is a gender-based class for purposes of Section 1985(3). *Geduldig* held that a denial of disability benefits to pregnant women was not unconstitutional under the Court's then still evolving gender/equal protection analysis. The Government relies heavily on the Court's statement that not all classifications on the basis of pregnancy are gender-based. Recent cases, however, indicate that that statement has little continuing relevance, at least outside the disability benefits context. *Johnson Controls* held that discrimination against fertile women is discrimination on account of sex. Surely there is no jurisprudential difference for this purpose between pregnant women and fertile women. *See Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983) (Pregnancy Discrimination Act "unambiguously expressed [Congress's] disapproval of both the holding and the reasoning of the Court in . . . [*General Electric Co.* v. *Gilbert*], 429 U.S. 125 (1976), which expressly relied on *Geduldig* and followed the logic of *Geduldig*).[43]

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opinion, *id.* at 467-68, the concurring Justices, *id.* at 476, 483, and the dissenters, *id.* at 488, recognized that the statute effected a gender-based classification because only men could be charged under it, even though the statute did not in terms refer to the potential perpetrators of the crime as men or males.

[43] Both *Gilbert* and *Geduldig* were widely criticized by commentators. See the collection of (several dozen) citations in Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 983-84 nn. 107-09 (1984).

Petitioners' argument that they aim their conspiratorial activity only at women they perceive to be making a particular choice regarding their childbearing capacity does not negate the gender-based nature of their conspiracy. The fact that some women are not burdened by the conspiracy is immaterial. This is so for a number of reasons. First, a classification or policy that burdens some but not all women—for example, only women wishing to work in jobs where airborne lead may be a risk, or only women with children under the age of six who wish to work in the paid labor force—is gender-based even though many women are unaffected. *See International Union* v. *Johnson Controls, Inc.*, 111 S. Ct. 1196; *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). Indeed, many sex discrimination cases involve "subsets" of women or, as in *Phillips*, "sex-plus" discrimination. There is no requirement under the Constitution or any statute, including Section 1985(3), that a majority of women be affected before a governmental practice or private conduct may be analyzed as gender-based.[44]

The *Gilbert* and *Geduldig* cases deal only with *benefits* to employees, and both decisions were based on the finding that benefits were distributed equally between the sexes. By contrast, in Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977), the Court found discrimination where there was imposed on pregnant women "a substantial burden that men need not suffer." Here pregnant women plainly are not deprived of a "benefit," but rather suffer a substantial burden in denial of access to health care that men do not. As in *Johnson Controls*, the pregnancy-based classification is sex-based.

[44] It is irrelevant that one of the petitioners, Jayne Bray, is a woman. Her participation does not turn a gender-based conspiracy into a gender-neutral one.

Second, the choice being made by the women targeted by petitioners—to seek abortion or related services—is a constitutionally protected right of women as a class. In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986), the Court emphasized that, when this right is denied, a woman is denied equality of treatment in respect of constitutional liberty:

> [The] promise [of individual liberty] extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision, with the guidance of her physician and within the limits specified in *Roe* - whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Singling some women out for the purpose of denying this right to all women, and the rights to travel and commerce necessary to effectuate it, is to conspire against women as a class.

Also, the fact that petitioners' conspiracy has an impact on some men does not negate the application of Section 1985(3). As this Court recognized in *Scott*, and as the legislative history confirms, a conspiracy against a protected class is no less class-based simply because supporters of the class that are not members of it are also affected by the conspiracy. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 487, 511, 517. The statute, at its very minimum, protects not just Blacks

but also protects "those who championed their cause" or "their supporters." *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. at 836. In *Novotny*, the Section 1985(3) claim was of discrimination against female employees of a savings and loan association, but the plaintiff was a man who "expressed support for the female employees" and was fired from his job. *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. at 369. Neither this Court nor the lower court in *Novotny* suggested that a conspiracy targeting women that also affected a man was, for that reason, not gender-based.[45]

The different effects of the conspiracy on women and men are also of significance. Even if men are indirectly affected, the true burdens of a clinic blockade are felt by women. Only they suffer the potentially serious health consequences of delayed or prevented abortion. Where women suffer "a substantial burden that men need not suffer," *Nashville Gas Co.* v. *Satty*, 434 U.S. at 142, as they do here, the challenged conduct is gender-based. Thus, petitioners' claim that, because their conspiracy affects some men, women cannot be the subject of the conspiracy is without substance.[46]

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[45] Similarly, in Loving v. Virginia, 388 U.S. 1 (1967), the Virginia statute punished both the Black and the white participant in an interracial marriage. The direct impact of the statute on whites in no way negated the fact the the statute discriminated against a group of Blacks. *See also* Michael M. v. Sonoma County Superior Court, 450 U.S. at 477 n.5 (Stewart, J., concurring) (treating a statutory rape law as a gender-based classification disadvantaging men even though women could be prosecuted for aiding and abetting).

[46] In Mississippi Women's Medical Clinic v. McMillan, 866 F.2d

Finally, the fact that the state and others may have an interest in the abortion decision (United States Br. 20) is not a reason for concluding that a conspiracy against women who have the right to make that decision is not a gender-based conspiracy for purposes of Section 1985(3). This case does not involve the right of the government to regulate abortion services or the public funding of abortions. This case involves the efforts of a private conspiracy to frustrate the rights of women who are in fact acting in *conformity* with the regulatory schemes adopted by the government.[47] *Harris* v. *McRae*, 448 U.S. 297, merely made clear that only the placement of a direct obstacle in the way of the exercise of a woman's privacy right

788, 794 (5th Cir. 1985), often cited by petitioners, the court assumed arguendo that "women of childbearing age who seek medical attention from the MWMC" defined a class for Section 1985(3) purposes, but went on to find that the allegations did not accurately define the dispute because defendants attempted "to dissuade *anyone* who contributes to the incidence of abortions" from doing so. *Id.* In so doing, the court did not acknowledge or take account of the legislative history, and statements of this Court, cited *supra*, which establish that a defendant may not be permitted to defeat the action by asserting that he also targets those who assist the targeted class.

The court's decision in *McMillan* may, in addition, have been affected by the fact that that case involved persons engaged in speech, not blockaders obstructing entrances. "The clinic offer[ed] no evidence . . . that the protestors *physically* restrained potential patients from entering the clinic." *Id.* at 791; *see id.* at 794.

[47] For example, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990), involves the government setting conditions on access to abortion services for some women. But in this case those conditions have been met; petitioners' conspiracy seeks to deprive women who have met these conditions from obtaining abortion services.

unconstitutionally burdens that right; simply failing to assist a woman in the exercise of the right, as by public funding of abortions, does not. Petitioners' blockades place just such a direct obstacle in a woman's path. Indeed, in a State where the legislature allows Medicaid funding of abortions, such as New York, petitioners' blockades prevent both Medicaid recipients and privately-insured women from obtaining access to clinics.

C. Petitioners' Activities Demonstrate an Invidiously Discriminatory Animus Against Women

An actionable conspiracy affecting a protected class under Section 1985(3) must be driven by an invidiously discriminatory animus against the class. As this Court stated in *Griffin* v. *Breckenridge*:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

403 U.S. at 102 (emphasis in original). Here, petitioners' conspiracy aims to deprive women of their right to make and carry out decisions respecting childbirth—constitutionally protected decisions about the most private of matters.

This is the requisite "animus or motivation," *Griffin* v. *Breckenridge*, 403 U.S. at 100, for Section 1985(3) purposes. Petitioners do not deny—they proclaim—that they want to prevent women from having

access to abortions and from seeking counseling and other related services. They choose to blockade clinics as a mob and intimidate the women patients rather than debating women about their choices and trying to persuade women to their view. Their assertions that they bear no ill will towards the women whom they frustrate in the exercise of their rights, and whose health they jeopardize, and that they oppose only the practice of abortion, do not avail them.

The animus requirement is not a requirement of hostility or ill will, as petitioners attempt to portray it.[48] In *Griffin* v. *Breckenridge*, the Court treated "animus" as a synonym for "motivation." 403 U.S. at 100. The common meaning of the word is "intention" or "objective." *See, e.g.*, Webster's Third New International Dictionary 89 (1986).

It is therefore irrelevant that petitioners protest their love and admiration for women, just as similar protestations regarding Blacks would have been irrelevant to the result in *Griffin*. Beneficent motives are also, of course, irrelevant to whether there has been discrimination based on sex, a point underlined by the Court in *Johnson Controls*, and made explicitly in *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973). The Court there spoke of the nation's "long and unfortunate history of sex discrimination" and said that "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in

[48] The United States commits this same error, arguing there is no "animus" because the blockades "are conducted for a purpose other than animosity toward women." United States Br. 14.

a cage." The Court of Appeals for the Second Circuit has aptly remarked in a blockade-injunction case just like this one that "[t]he denial of ill-will towards the women they target and the claim that defendants' actions will benefit these women amount to an argument that 'we are doing this for your own good'; a contention that usually shields one's actual motive." *New York State NOW* v. *Terry*, 886 F.2d at 1360.

Most of what petitioners and their amici say by way of trying to refute the proposition that they entertained the required class-based animus is essentially: we are opposed to abortion, not to women. But, as demonstrated above, a conspiracy against a class of women of childbearing age, pregnant and seeking help, is a conspiracy against women. Thus the Second Circuit, responding to the same argument, noted that "[i]n most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable, such as [referring to *Griffin*] travelling interstate with the perceived purpose of promoting civil rights." *Id.* at 1359-60. After citing *Griffin*, the court continued, "[i]t is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them." *Id.* at 1360.

It is difficult to see how the United States advances its cause by arguing that what creates "invidious discrimination against women *per se* is the *intent* to disadvantage women as a class of individuals." United States Br. 16 (emphasis in original) (citing *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979)). In

fact, the Fourteenth Amendment intent test is irrelevant here, not just because this case concerns a civil rights statute and not the Constitution,[49] but also because the *Feeney* test is relevant only to a case in which a facially neutral governmental practice has a disparate impact on a protected group that may or may not have been intended. *See Rogers* v. *Lodge*, 458 U.S. 613 (1982); *Personnel Administrator* v. *Feeney*, 442 U.S. 256. This case is not a disparate impact case. When, as discussed above, the conspiracy's aim is to close the doors of clinics to the women who are their patients, then the conspiracy is aimed—as intentionally as it could be—at those women patients.

These petitioners were moved by a class-based animus. The evidence persuaded the district court that petitioners "engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counseling services, of the right to travel." 726 F. Supp. at 1493 (Pet. App. 29-30a).[50] Instead of clubbing their victims, as the respondents did in *Griffin*, petitioners here would by the power of numbers and tactics of intimidation block the doors of medical facilities to keep women from patronizing those facilities. The result in each case is, as intended, a denial of equal protection and equal access to the privileges and immunities of federal citizenship to a class of citizens through physical coercion of a few.

[49] *See generally* Washington v. Davis, 426 U.S. 229 (1976) (distinguishing the intent requirement for equal protection analysis from the intent needed for Title VII).

[50] The statement is made under the heading "Conclusions of Law" in the district court's opinion, but it in substance is a finding of fact on a question of "discriminatory intent" or of "actual motive," which is reviewable, as this Court held in Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982), only under the "clearly erroneous" standard of Rule 52 of the Rules of Civil Procedure. *See also* Rogers v. Lodge, 458 U.S. at 622-23.

The animus driving petitioners' conspiracy was to deprive women of their constitutional right to elect abortion, and to employ interstate travel and commerce where necessary to exercise that right. There can be no question that such animus was directed at women and was "invidiously discriminatory."

II. RESPONDENTS HAVE ESTABLISHED A VIOLATION OF RIGHTS PROTECTED BY SECTION 1985(3)

Under Section 1985(3), there must be a deprivation "of the equal protection of the laws, or of equal privileges and immunities under the laws," or State authorities must be "prevented or hindered" from securing the "equal protection of the laws." The federal rights affected by petitioners' conspiracy are the right to travel and women's related right to engage in interstate commerce, and the right to privacy.

A. Petitioners' Activities Interfere with Women's Right to Travel and to Engage in Commerce

The district court found that the petitioners engaged in their conspiracy "for the purpose, either directly or indirectly, of depriving" women at whom the conspiracy was aimed "of the right to travel." 726 F. Supp. at 1493 (Pet. App. 29-30a). If that finding is treated, as it should be, as a formal finding of fact—made after the court heard three days of testimony on the merits—then there need be no signif-

icant argument under this heading. Petitioners do not assert that the court's decision was "clearly erroneous", and, as will be seen, they would not be warranted in making such an argument.

On the law, there is no doubt that the right to travel is one of the rights protected against private conspiracies by Section 1985(3). The Court held in *Griffin* v. *Breckenridge* that "the right of interstate travel is constitutionally protected, does not necessarily rest on the the Fourteenth Amendment, and is assertable against private as well as governmental interference." 403 U.S. at 105. It was therefore open to the petitioners in that case, on remand for trial, to prove that

> they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

Id. at 106. Here it has been found that a substantial number of women have traveled or intended to travel interstate to patronize the blockaded clinics and, as the district court found, the right to do this was one of the rights meant to be discriminatorily impaired by the conspiracy. 726 F. Supp. at 1493 (Pet. App. 29-30a).

Even if the district court's finding is not taken as conclusive, it is clear that petitioners' conspiracy would infringe women's rights to travel and to engage

in commerce. This Court has repeatedly recognized the constitutional right to travel as a federal basis for forbidding private acts of invidious discrimination, even though protection of the right to travel was not the primary purpose of the statute involved or the primary target of the private parties against whom the action was brought. It has done so in *Griffin* v. *Breckenridge* with respect to Section 1985(3); in *United States* v. *Guest*, 383 U.S. 745 (1966), with respect to a companion criminal statute; and in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), with respect to the public accommodations provisions of the Civil Rights Act of 1964.

Both the right to travel and the related right to engage in interstate commerce are fundamental incidents of United States citizenship. "The right to interstate travel is a right that the Constitution itself guarantees . . . [and] is a right secured against interference from any source whatever, whether governmental or private." *United States* v. *Guest*, 383 U.S. at 759-60 n.17. Similarly, "[t]o carry on interstate commerce is . . . a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891); *see also, e.g., Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) ("right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."). The right to engage in interstate commerce is one of the "rights, privileges, or immunities" protected by Section 1983. *Dennis* v. *Higgins*, 111 S. Ct. 865 (1991). Like the right to travel, it is secured against

interference from private as well as governmental sources. *In re Debs*, 158 U.S. 564 (1895).

This Court has indicated that the right to travel is infringed by inhibitions on travel across state borders in order to obtain abortion services. In *Doe* v. *Bolton*, 410 U.S. 179 (1973), this Court stated that women patients traveling from out-of-state to Georgia to obtain abortion services are protected. The Court said that the right to travel "must . . . protect persons who enter Georgia seeking the medical services that are available there." *Id.* at 200. In *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975), the Court declared that Virginia could not "prevent its residents from traveling to New York to obtain those [abortion] services," citing *Guest, Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Doe* v. *Bolton*.[51]

In this case the conspiracy would unquestionably inhibit women from traveling to Virginia to obtain abortion services. The provision of abortion services is intimately linked, much more than the provision of other medical services, to interstate travel. As this Court is aware, state laws vary greatly in the restrictions they place upon abortion. Women in jurisdictions with more restrictive laws than Virginia's will travel to Virginia to obtain abortion services. In addition, some clinics provide services not generally available from other clinics. The trial record shows that a suburban Maryland clinic would, in documented

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[51] The United States labors at length to use this one-line statement from *Bigelow* as authority for the proposition that "nonpurposeful", "indirect" restraints on travel do not invade the right. United States Br. 28-29. On a fair reading, no such negative interference could possibly be drawn.

cases of rape or incest, provide late second trimester abortion services; women will travel from out-of-state for these services because the nearest clinics providing them are in New York and Georgia.[52]

On the basis of the trial record, the district court found that

> [s]ubstantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics. For example, approximately twenty (20) to thirty (30) percent of patients served at the Commonwealth Women's Clinic in Falls Church, Virginia come from out of state. Records for these patients reflect permanent residence addresses in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida.

726 F. Supp. at 1489 (Pet. App. 22a). Testimony was also received regarding a blockade of a clinic in Maryland; at that clinic "a majority of the patients travel from out of state." *Id.* Petitioners clearly knew that a substantial portion of the women affected by their blockades had traveled interstate to get to the barred clinics.[53]

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[52] Tr. 31, Nov. 20 am (Lofton); see also Brief of Amici Curiae National Abortion Federation, et al.

[53] The United States District Court for the Southern District of New York had in January 1989 noted the high incidence of interstate travel to reach abortion clinics well before this Virginia litigation. *See* New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989). Petitioners Operation Rescue and Terry were defendants in that litigation.

The impact on travel shown by this record is clearly more direct, sustained, and substantial than could have resulted from the one episode in *Griffin* v. *Breckenridge*, where one car was pulled over on the highway. 403 U.S. at 89-91. The cases in which this Court has found interference with the right to travel from discrimination occurring at local restaurants and motels that served both in-state and out-of-state residents are also relevant. In *Heart of Atlanta Motel, Inc.* v. *United States*, an Atlanta motel refused to accommodate Blacks, both residents and non-residents. The Court found "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." 379 U.S. at 253. In the companion case of *Katzenbach* v. *McClung* the Court noted "an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes." 379 U.S. at 300.

The clinics in this case, like the motels and restaurants, are doing business in one locale. As in those cases, access to a facility is blocked both for residents and for non-residents. Like the motel and restaurant cases of the 1960's, the denial of access to these facilities causes a material impairment of the right to travel, and of the related right of the travelers to engage in interstate commerce. No meaningful distinction may be drawn between the impact of petitioners' activities on these constitutional rights and that found in *Griffin*, *Heart of Atlanta Motel*, *Katzenbach* v. *McClung*, and similar cases.[54]

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[54] Petitioners argue that the right to travel should not be recognized in this case because many businesses are located on interstate travel routes, or close to state borders. Pet. Br. 25.

There is nothing in this Court's decisions that suggests that the constitutional right to travel asserted in this case is not impaired by petitioners' blockades of clinics routinely serving persons from out-of-state. Petitioners are plainly wrong in attempting to limit the travel right to "interstate migration" as opposed to "mere physical movement" (Pet. Br. 26), and are also wrong in asserting that, "[i]f the obstacle in question applies to *both* interstate and intrastate travelers, then the right to interstate travel is not implicated". *Id.* at 27. The cases discussed above uniformly refute these simplistic arguments.

The Government is also wrong in asserting that, in the absence of discrimination against an interstate or out-of-state traveler, the right to travel is infringed by a Section 1985(3) conspiracy only when a defendant specifically intends to violate that right. United States Br. 25. This argument ignores the trial court's factual finding that there was a purpose to deprive women of the right to travel, 726 F. Supp. at 1493 (Pet. App. 29-30a), and it ignores the Court's statement in *Griffin* v. *Breckenridge* that the "motivation aspect of Section 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." 403 U.S. at 102 n.10.[55] Consistent

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However, the incidence of concerted denials of the right to travel to classes of persons for invidiously discriminatory reasons is surely not great, as evidenced by the paucity of right to travel cases since *Griffin* and *Guest* defined its scope in this context. In any event, and whatever may be its incidence, there is no reason at all why federal law should not be applied when such a deliberate federal wrong occurs.

[55] *See also* Monroe v. Pape, 365 U.S. 167, 187 (1961) (noting the absence of such an intent requirement for Section 1983, and

with that statement, the Court, in listing the things it was open to the plaintiffs to prove on the remand to make their case (*id.* at 106), listed the alternatives in the disjunctive: it would be enough if plaintiffs proved that "they had been engaging in interstate travel or intended to do so" *or* if they proved that the conspirators meant to impair plaintiffs' right to travel, to drive plaintiffs' out-of-state driver from the state, or to deter the plaintiffs from associating with him. The Government limits its quotation from *Griffin* so as to omit the Court's first test listed above. United States Br. 25. This test is incompatible with the Government's argument that petitioners must be shown to have intended to prevent interstate travel.[56]

B. Petitioners' Activities Also Interfere with the Right to Privacy

Respondents have also relied upon petitioners' deprivation of their right of privacy to state a cause of action. However, neither the district court nor the court of appeals reached the privacy claim because it was not necessary for them to do so. 726 F. Supp. at 1493-94 (Pet. App. 31-33a); 914 F.2d at 586 (Pet. App. 9a). Accordingly, there have been no decisions below on this claim, and no question relating to it

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that a person is "responsible for the natural consequences of his actions").

[56] The reliance of petitioners and of the Government on the intent language in United States v. Guest, 383 U.S. at 760, is misplaced, since that was a criminal prosecution. Pet. Br. 28-29; United States Br. 26. *Guest* relied on Screws v. United States, 325 U.S. 91 (1945), which was also a criminal prosecution, and one in which the relevant statute only penalized acts "willfully" depriving a person's rights. This Court, in Griffin v. Breckenridge, pointed out the inapplicability of the "willfulness" test of *Screws* in a Section 1985(3) case. 403 U.S. at 102 n.10.

was presented in the petition for certiorari. Respondents therefore agree with the suggestion made by the United States that the Court need not review respondents' right to privacy claim at this time. United States Br. 10 n.10.

Unless the Court finds that the injunction cannot be supported on either a federal basis or a pendent state basis, the judgment below will be affirmed. If this result is not reached, it would then be appropriate to remand for full briefing and decision of respondents' right to privacy claim. At that time respondents would present a number of contentions respecting this claim.

The second clause of Section 1985(3) provides for a remedy when a conspiracy to deprive the right to privacy (even if by purely private actors) has hindered the State in its obligation to secure the equal protection of the laws to all persons.[57] In this connection, the trial court found that petitioners, by means of their blockades, had hindered the police in securing to women their right to privacy, as well as in securing to respondent clinics their rights to be free from state law violations. On the basis of testimony from, among others, a lieutenant in the Falls Church Police Department, the court found:

> that the Falls Church Police Department consists of thirty (30) deputized officers. Typical of most "rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for

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[57] See Brief of Amicus Curiae, City of Falls Church.

> more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a facility for some period of time.

726 F. Supp. at 1489 n.4 (Pet. App. 22-23a n.4). One clinic was closed for eleven hours. *Id.* at 1490 (Pet. App. 23a). Falls Church police must seek assistance as well from the Arlington County Sheriff's Department, the Arlington County Police Department, the Virginia State Police, and at times the Virginia Department of Corrections in order to deal with the petitioners' blockades.[58]

In addition, proper application of the *Scott* decision to a right to privacy claim would have to be considered under the first clause of Section 1985(3). Contrary to petitioners' suggestion (Pet. Br. 31-34), the Court there did not require proof of "State action"; rather the Court merely indicated that "it was necessary . . . to prove that the State was somehow involved in or affected by the conspiracy." *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. at 833. The proof on this record demonstrates such an "effect on" the State, or "involvement of" the State. In addition, respondents contend that Section 1985(3) protects against private interferences with federal rights, regardless of the source of those rights, and therefore that as a matter of statutory construction neither "State action" nor "State involvement" is required for a Section 1985(3) claim implicating a federal constitutional right. *Id.* at 841 (Blackmun, J., dissenting).

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[58] Tr. 52, Nov. 16 pm (Lt. King).

Finally, as *Griswold* v. *Connecticut*, 381 U.S. 479, 484-88, 493 (1965), suggests, the constitutional source of the right to privacy, like the source of the right to travel, may be such that respondents are not required to allege and prove either state action or state involvement in a Section 1985(3) action.

III. THE DISTRICT COURT'S DISCRETIONARY EXERCISE OF PENDENT JURISDICTION WAS PROPER

Pendent jurisdiction is properly assumed so long as the federal questions raised in the complaint are "substantial" and the state and federal law claims "derive from a common nucleus of operative fact." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Petitioners challenge only the district court's conclusion that respondents' federal claims are substantial.

In order to be "substantial," a federal claim need not ultimately prevail. There must merely be "substance sufficient to confer subject matter jurisdiction on the court." *Id.* (citing *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103 (1933)). As petitioners concede, the exercise of pendent jurisdiction is only improper if the federal claim is "absolutely devoid of merit," *e.g.*, if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " *Id.* at 105-06 (quoting prior precedent). *See also Oneida Nation* v. *County of Oneida*, 414 U.S. 661, 666-67 (1974).

Here this test is obviously met. No prior cases of this Court even suggest the federal claim is without merit, much less frivolous. No federal claim is frivolous that has been explicitly endorsed by two courts

of appeals and seven district courts. These lower court decisions dealt with the same tactics, organized by the same leaders, that are in issue here. While petitioners label this federal claim with various pejoratives, they never explain how a federal claim with the judicial endorsements that this one has can possibly be called "patently meritless," "patently and woefully inadequate," etc. Pet. Br. 34-36.

In these circumstances, the judgment below, resting as it does on threatened violations of Virginia trespass and public nuisance law as well as of Section 1985(3), must be affirmed.

IV. THE AWARD OF ATTORNEYS' FEES WAS PROPER

Petitioners' challenge to the award of attorneys' fees rests on the argument that respondents should not prevail on any of their claims. Since this argument is without merit, the attorneys' fees award should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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